



# State Administration, Public Retirement, and Veterans' Affairs Interim Committee

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## 56th Montana Legislature

### SENATE MEMBERS

SUE BARTLETT, VICE-CHAIR  
E.P. "PETE" EKEGREN  
DON HARGROVE  
GLENN A. ROUSH

### HOUSE MEMBERS

MATT BRAINARD, CHAIRMAN  
EDITH J. CLARK  
TOM DELL  
CAROL WILLIAMS

### COMMITTEE STAFF

SHERI HEFFELFINGER  
RESEARCH ANALYST  
JOHN MacMASTER, ATTORNEY  
DAVID NISS, ATTORNEY  
JOANN JONES, SECRETARY

## MINUTES

March 30, 2000  
Montana Association of Counties  
Helena, Montana

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of documents.**

### COMMITTEE MEMBERS PRESENT

Rep. Matt Brainard, Chairman  
Sen. Sue Bartlett, Vice Chair

Sen. E.P. "Pete" Ekegren  
Sen. Don Hargrove  
Sen. Glenn A. Roush

Rep. Edith J. Clark  
Rep. Tom Dell  
Rep. Carol Williams

### STAFF PRESENT

David Bohyer, Director, Office of Research Policy and Analysis  
Sheri Heffelfinger, Research Analyst  
John MacMaster, Attorney  
Jo Ann Jones, Secretary

### VISITORS

Visitors' list, Attachment #1.

### **COMMITTEE ACTION**

C Approved the minutes of the February 28-29, 2000 meeting

### **CALL TO ORDER AND ROLL CALL**

Rep. Brainard called the meeting to order at 8:33 a.m. Roll call was noted. See Attachment #2.

Sen. Bartlett moved the February 28-29, 2000, minutes as corrected. The motion passed by unanimous voice vote.

### **HB 79 UPDATE**

#### **Exhibit #1: Employer survey**

#### **Exhibit #2: Education, Stable Value Investment, and Variable Investment Option Proposals**

Mike O'Connor, Executive Director, Public Employees' Retirement Division (PERB), said Exhibit #1 had been mailed out to all Public Employees' Retirement Systems (PERS) employers. He said the survey has a submission deadline of March 31, 2000.

Sen. Hargrove asked how many surveys were mailed out, and who are the largest and the smallest employers. Mr. O'Connor said there are 500 PERS employers, the state is the largest employer, but there are employers who have only one employee.

Kathy Samson, Bureau Chief, Defined Contribution Plans & Educational Services, PERD, discussed Exhibit #2.

Sen. Roush asked what the term of contract would be between the state and a vendor. Ms. Samson said the term of contract would be between five and seven years.

Rep. Dell asked if a contract could be stopped, if necessary. Ms. Samson said there is always a for-cause termination clause, and contracts usually allow a remedy period in which to correct non-compliance.

Sheri Heffelfinger, staff, asked if a stable value fund was the same as a balanced fund. Ms. Samson said they are different funds. Ms. Heffelfinger asked how the PERB interprets the provision that if a member makes no investment choice, the member's investment automatically defaults to a balanced fund. Ms. Samson said the default fund is a separate fund that provides conservative, moderate, or aggressive investment profiles.

Ms. Heffelfinger asked for PERB interpretation of the separation of the education component. Ms. Samson said that the separation issue was difficult because the appropriate section can be interpreted more than one way. Rep. Brainard said the bill was intended to separate the education component because it was not thought desirable for the educator to influence the potential investor in any particular direction. He said that it must be accepted that the vendor will do supplementary education which cannot be excluded. He said the supplementary education may be beneficial to the program. Sen. Bartlett said that she believes the education about investment choices will come from the vendor of the investment products, but that will occur after the member has chosen the defined contribution (DC) plan. Mr. O'Connor said the law must be examined to make sure it allows the vendor to do educational work, but that he does not think the law will allow it.

Rep. Brainard said there is a gray area that must be monitored because educating the member is one thing, but selling to the member is totally different. He said that he wants individuals to make investment choices based on sound information, not marketing strategies. Ms. Samson said that many times the vendor does not provide the information to the individual but rather to the administrator, who disseminates the

information. She said what needs to be clarified is the identity of the disseminator of the information packets.

Sen. Bartlett asked if expense ratios were clearly stated in the proposals. Ms. Samson said that is one facet that will be examined and ranked by the consultant.

Rep. Brainard asked for public comment. There was none.

## **SJR 9 CONTRACTING STUDY**

**Exhibit #3: Issues and Options Worksheet**

**Exhibit #4: Letter from Dr. Peter Blouke, Director, Department of Commerce**

**Exhibit #5: Fax from Tryg Dahle, dba Intelicom, Inc.**

**Exhibit #6: Letter from Sheryl Motl, Chief, State Procurement Bureau**

**Exhibit #7: Negative Effects of Bid Preferences on a Montana Business**

**Exhibit #8: Challenges in Information Technology (IT) Procurement**

**Exhibit #9: Narrowing the Focus**

**Exhibit #10: LC 0004**

**Exhibit #11: LC 0005**

### **Contract Preferences**

Option 1: Repeal Montana resident and Montana made preferences

Option 2: Leave the statutes as is

Dave Bohyer, staff, said the Department of Administration (DOA) recommends the adoption of option #1 because it believes that preferences do little to help Montana businesses and does much to harm some of them.

Sen. Bartlett said eliminating the preferences is a controversial decision. She said that if the Committee intends to go ahead with legislation for their repeal, interest groups should have an opportunity to comment so that educational work can be done in advance of the controversy.

Rep. Brainard said that Sen. Bartlett's suggestions may be important things to do. He said that although previous testimony indicated that there may be overt discrimination against Montana businesses in other states, there may be other discrimination in other states although it may not be clearly stated in law. He said that he had a feeling that

vendors might come back to the Legislature asking for reinstatement of the preferences, if they are repealed.

Sen. Roush said that comment from business people indicates that they perceive it as a tangible protection for them, but that he understands that it is really a barrier. He said he would really like to know if businesses really do benefit from preferences. He said he agreed that education must be provided to the public if option #1 is adopted.

Rep. Brainard said other states have laws that work on the principle of reciprocity. Rather than merely eliminating Montana preferences, the Committee should examine mirroring what other states do. He said the system would not be eliminated, but Montana would be falling into line with what other states do.

Sen. Hargrove said the business environment has changed greatly since preferences were established and it's much easier to do out-of-state business today than it was then. He said that he doesn't recall any testimony that quantified the benefit received from preferences. He said that it might be better to just eliminate them entirely and say that Montana is wide open and that it hopes other states are, too.

Rep. Brainard drew the Committee's attention to Exhibit #5, saying that states that still have preferences are listed. He said that he sees no reason to give anything away to those states that still have preferences.

Sen. Hargrove said Rep. Brainard's suggestion to mirror other states' policies may be the best way, but he still felt that it might inhibit trade rather than open it up.

Sen. Bartlett said that she would welcome public comment on adoption of a reciprocity policy.

Tryg Dahle, Intelicom, Inc., discussed Exhibit #7. He said that Intelicom was denied a bid in New York in 1999 because of the Montana preference. He said the value of the project was \$150,000. He said he considered the New York laws to be retaliatory instead of reciprocal.

Sen. Ekegren asked if Mr. Dahle was willing to compete with more out-of-state vendors coming into Montana if preferences are repealed. Mr. Dahle said that the amount of work available in Montana is so small that it should not be a detriment, but would be willing to accept that situation. Sen. Ekegren said that he agreed that preferences should be eliminated, but feels that all Montana businesses should be educated about doing business with the state.

Rep. Dell asked if Mr. Dahle feels that New York may be approached again if preferences are repealed. Mr. Dahle replied that he feels there is a lot of opportunity in New York, and said that he did research work in New York for a couple of years, spending money that is not retrievable as of today.

Sen. Bartlett asked for comment from the Procurement Division. Marvin Eicholtz, Administrator, Procurement and Printing Division, DOA, said that he would support either option, but personally leans toward reciprocity. He said that, administratively speaking, a reciprocity policy is not burdensome. Ms. Motl said that there is currently a reciprocal policy on construction contracts. She said the Montana Contractors' Association had requested that preferences for construction contracts be repealed because contractors were being badly injured in other states.

Sen. Hargrove asked if the DOA has data on the effect of reciprocity. Ms. Motl said that it could be provided to the Committee. Sen. Hargrove said Montana is unique in that most businesses are small and that he believes small business will take care of the small jobs and does not believe that out-of-state firms would have much interest

in those small jobs. He said that he does not see a compelling reason to add a reciprocity policy and feels that it may be better to start off without.

Rep. Brainard asked for a show of hands to indicate whether repeal of preferences or a reciprocity policy is favored. Four members voted for repeal of preferences, and four members voted for pursuing a reciprocity policy. Rep. Brainard asked staff to prepare draft legislation that repeals preferences and establishes a reciprocity policy.

Sen. Roush asked for comment from the Montana Chamber of Commerce. Webb Brown, President, MT Chamber of Commerce, said the protectionism harms businesses that are attempting to do out-of-state business, but businesses who operate only with Montana perceive that out-of-state competition hurts them. He said that proponents of preferences may not be able to see the negative consequences.

#### Additional Tools for Procurement

Mr. Bohyer said that the law allows for a sealed (low) bid and the Request for Proposals (RFP) process only. He said that the DOA recommends option 1.

- Option 1: Expand the statutory list of procurement tools
- Option 2: Amend law to set a broad state policy for procurement and require the DOA to adopt rules to implement that policy
- Option 3: Authorize the DOA to develop pilot project(s) for new procurement methods
- Option 4: Leave the statutes as they are now

Sen. Hargrove said he strongly supports option #1, with some reservations. He said his concern is that people are accustomed to the low bid and RFP system, and the adoption of more methods might result in increased litigation. In that case, he would recommend option #3.



Rep. Brainard said that he shares Sen. Hargrove's concern and asked how the DOA, for instance, would determine "best value." Ms. Motl said the definition of best value varies, and the broader picture must be examined first.

Rep. Brainard asked if best value would be determined on a case-by-case basis and said that if that is true, it might be possible to define the term statutorily. Ms. Motl said other states give a general definition of best value in statute, and rely on department rules to further define the term. She said that a lot of definition would be done in rules. Rep. Brainard asked if she intended rules or guidelines, because people tend to perceive rules as being just below the law, and said that guidelines tend to be more flexible. Ms. Motl said she agreed with Rep. Brainard's analysis.

Rep. Brainard asked if a decision based on best value is justifiable. Ms. Motl replied that decisions made now are justifiable, so a best value decision could be justified, too.

Rep. Dell asked if the DOA would be careful in utilizing an expanded list because it could turn out to be a veritable Pandora's Box. Ms. Motl said that education is the most important component in communicating to businesses what the state wants, and the education includes how offers are rated and what determines best value.

Dal Smilie, staff attorney, DOA, said that legislation could be carefully drafted to ensure that best value is not so broadly defined that it could result in litigation.

Sen. Bartlett said that option #1 includes more than best value determination. She said the weakest area is ensuring that people have the knowledge and skills to use alternate procurement methods effectively. She asked for clarification on expansion of sole source definition. Ms. Motl said that option #1 did not contain a definitive list but rather suggestions for consideration, and that she shared Sen. Bartlett's concern.

She said that sole source is now defined as only one company that provides a particular product. Agencies have difficulty proving that a source is the only source. The narrow definition makes it difficult to hire experts as consultants and redefining the term would recognize unique situations that make writing RFPs so laborious.

Mr. Smilie added that situations exist where there are other sources, but only one of them is interested. He said that there is difficulty involved when an existing contractor can also provide another service.

Rep. Brainard said the state must be careful when hiring experts because it's easy to develop peer groups that bar others from having an opportunity to participate. He asked how far the reach would be extended -- nationwide or just regionally -- and asked how it can be proven that another person is more expert than the one who is located in Helena. He said the timeline on a bidding is cut and dried if there is only one bidder. Even with a sole source, there must be a timeline on a competitive bid.

Mr. Smilie said that unique situations is what is being considered, and said that there is a point when it becomes inefficient to keep going out for bids. He said that a problem exists when time is of the essence and either no one responds to the call or a responder is not a responsible bidder.

Rep. Brainard said that language providing for the "if then" situation can be developed.

Rep. Brainard asked for clarification on private sector partnerships. Ms. Motl said that is a concept that is being used in other states, primarily for information technology (IT) procurement. She said that it would have to be researched thoroughly before it could be given serious consideration.

Jeff Brandt, Information Services Division (ISD), discussed Exhibit #3, and said that ISD currently manages 270 contracts that involve 100 vendors. He said that IT procurement is a rapidly changing arena, the contracts are becoming more complex and involve higher dollar amounts. There is an increasing reliance on the private sector and the vendor environment itself changes rapidly.

Mr. Bohyer said that Mr. Brandt's testimony would be repeated from other departments in regard to contract complexity, visibility, and litigation.

Sen. Hargrove asked if expanding procurement tools would increase the likelihood of litigation. Mr. Brandt said that statutes would have to be carefully constructed because litigation could increase if the perception exists that procurement officials have *carte blanche*.

Rep. Brainard asked for clarification on the term "partnership," stating that it's a very different concept than "contracting."

Mr. Eicholtz said one example involves the auction of surplus state equipment. He said that it used to be only for state equipment, but in the last few years, auctions have been with both public and private sector items available for sale. He said the partnership with the private sector cuts costs for both entities. Rep. Brainard asked where the partnership ends, and asked if it might eventually include anyone in the state who might want to dispose of surplus equipment.

Sen. Hargrove asked for a legal opinion on whether legislation could expand the list of procurement methods effectively enough to curtail litigation.

Mr. Smilie said the term "partnership" has a legal as well as a public relations meaning. He said that a narrow definition should probably be considered, but there

must be ways to leverage making Montana a better place, too. He said a private sector partnership does not have to be permanent, nor does it have to create monopolies.

John MacMaster, staff attorney, said that bills should be drafted to be specific, allowing the DOA to flesh out the definitions with rulemaking authority granted by the bill.

Mr. Bohyer said he agreed with both positions. He said that legislation cannot be written to eliminate litigation but it can be written to make it more likely that the state will win a potential lawsuit. He said he believes that it is unlikely that the DOA will adopt widespread changes in procedure very quickly, but would carefully sample other options and incorporate change gradually.

Rep. Brainard said he favors option #1, but has concerns about developing definitions and the use of the word "partnership." He said that it could be a slippery slope of governmental influence. He said that he was also concerned about delegation of rulemaking authority.

Rep. Brainard asked for public comment.

Ellen Feaver, owner of a Montana business, said that much of the business that her firm used to do with the state of Montana is now going to out-of-state firms. She said that RFPs are sometimes crafted so narrowly that Montana businesses are virtually excluded. She said that the approach to procurement should not be so defensive because very few procurement contracts result in litigation.

Ron Drake, President, Drake Engineering, Inc., said that 92% of revenue from last year came from out-of-state contracts. His firm spent approximately \$50,000 during the

past ten years trying to win state contracts, and they have finally stopped trying. He said the driving force in state procurement is fear of litigation. He said private sector partnerships are called cooperative agreements in the federal government. They are limited agreements designed for a specific purpose.

Geoff Feiss, General Manager, Montana Telecommunications Association, said that they share the concern with private sector partnerships, and maintain that contracts are essential.

Sen. Bartlett said the private sector partnership concept could be isolated and placed in another option for further research and consideration.

Rep. Brainard said that he agreed with Sen. Bartlett's statement. He said that it could still be a tool, but a tool that is used very selectively. He said that those who object will always be heard when legislation is debated. Rep. Brainard instructed staff to examine option #1 and develop draft legislation accordingly.

Sen. Bartlett asked Ms. Feaver and Mr. Drake for more information on where barriers exist. Ms. Feaver said the scoring system (for RFP submissions) is evidence of the fear of litigation. Specifications are so precise that they preclude Montana businesses, as does declaring the number of repetitions of having done the exact same thing before. Mr. Drake said he agreed with Ms. Feaver's statement and said that the scoring system is rigorous and sometimes arcane, and there is a weighting of scores in RFPs for services. He said a lot of weight is given to those firms who have already done a lot of work for the state.

Sen. Bartlett said a best value approach would allow firms to present information that is not allowed on an RFP.

Steve Garrison, staff attorney, Department of Transportation (DOT), said the statutes are very specific for contracting of engineering services and are different than the citations given for the Committee's consideration.

Sen. Ekegren said he wonders if the state has tried to prevent litigation so diligently that local people are effectively prevented from attempting to bid on the project. He cited a case where a local rest area could have been constructed locally for less money, but none of the local contractors submitted a bid for the project.

Rep. Brainard said many contracts are inhibited by federal standards if federal money is used.

Mr. Smilie said that the narrow drafting of specifications is a reflection of needed ongoing training.

Mr. Bohyer said that, in context of Sen. Ekegren's comments, it cannot be determined why individuals do not submit bids on a particular project. Rep. Brainard said that it is impossible to know the specifics of that case without having those contractors testify before the Committee, or perform investigations to determine why they did not bid.

#### Small Business Access to Contracts

Option #1: Develop a comprehensive program to attract and educate Montana businesses

Option #2: Create new preferences for Montana businesses

Option #3: Raise the thresholds for procurement without competitive bids, stating that any contracts below the threshold would automatically be awarded to Montana businesses

Option #4: Design and implement a database for statistics relevant to bid and proposal solicitation and award

Option #5: Take no action

Mr. Bohyer said the DOA has expressed no preference for any of the listed options.

Sen. Ekegren said there are good components to option #1.

Sen. Hargrove said that he advocates option #5, do nothing, because business will educate itself to be successful.

Sen. Ekegren said that option #1 states that businesses would have easy access to information, and it does not state that a bureaucracy would be created.

Sen. Hargrove asked if information for businesses is available now. Ms. Motl said handbooks are available and information is posted on the Internet, but the DOA would like to communicate more with small businesses. She said that small businesses may be intimidated by the requirements.

Rep. Brainard said it's a sad commentary on the state of the economy when small businesses view state contracts as a means to save their businesses from failure.

Mr. Bohyer discussed Exhibit #9.

Mr. MacMaster discussed LC 0001, LC 0002, and LC 0003, contained within Exhibit #9.

Rep. Brainard said if there was no objection to proceeding with LC 0001 (interest on overdue payments), he would instruct staff to go ahead with drafting legislation.

Mr. Garrison said he was concerned by the term "administrative proceeding" used in LC 0001 because it may be confused with MAPA. Mr. MacMaster said that particular phrase could be struck without harming the intent of the bill.

Sen. Bartlett said she thought striking those words would be appropriate. Rep. Brainard instructed staff to proceed.

Mr. Bohyer said that LC 0001, and any other subsequent drafts that are approved by the Committee, will go through the formal draft request process and it will be noted that the request is made by this interim committee.

Mr. MacMaster discussed LC 0002 (requiring a specific statement of the law that was violated in a contested contract, and abolishes the requirement of a contested case hearing).

Sen. Bartlett asked if this legislation would preclude anyone from receiving a contested case hearing. Mr. MacMaster said it precludes an individual from forcing the state to give them a contested case hearing but still allows a hearing, at the state's discretion.

Rep. Brainard said if the department realizes it made an error, the department would probably prefer a contested case hearing rather litigation, so that provision should weed out frivolous complaints. He said that if there was no objection, he would instruct staff to proceed with drafting legislation from LC 0002.

Mr. MacMaster discussed LC 0003 (stating that the Montana Procurement Act applies to all contracts unless specifically exempted).



Rep. Brainard said that if there was no objection, he would instruct staff to proceed with drafting legislation from LC 0003.

Mr. MacMaster discussed LC 0004 (prohibiting government employees from having an interest in a state contract).

Sen. Bartlett asked for clarification of the new language in Section 1 so that it does not appear to be a double negative. She also questioned the use of the term "immediate supervisor" in subsection (c). Mr. Smilie said the use of that term is because there was no clearcut place to stop on the chain of command for accountability.

Sen. Hargrove said it should stop with the person directly involved, unless another person becomes directly involved.

Mr. Eicholtz said including the supervisor at all doesn't make much sense.

Sen. Bartlett suggested putting the term "immediate supervisor" at the end of the sentence.

Rep. Brainard asked if statute now prohibits supervisors from exerting influence on employees in order to influence their behavior. Mr. MacMaster said that 45-7-401, MCA, applies to improper influence. Rep. Brainard requested that provision be included in the language of LC 0004.

Rep. Brainard said there should be clarification of improper influence before proceeding with the legislation from LC 0004.

Sen. Bartlett said that she would like more information on what types of penalties exist for influencing contracts through employment.

Mr. MacMaster discussed LC 0005 (expansion of the general application of state procurement laws).

Sen. Bartlett said the term "recreational" used in the last section might be too broad.

Mr. MacMaster said the legislation states that the department may exempt, but is not required to exempt, and appears to apply for secondary procurement of goods and services when the landowner is already under contract to the state.

Sen. Hargrove asked what a grant is. Mr. Smilie said the common perception is that a grant is money for nothing, but it actually is a contract.

Rep. Brainard said the section is an exception for a unique situation in which a landowner will not do the work any other way. He said the agency would be wise to use this section as a last resort, but it is a necessity.

Rep. Brainard said that he is not aware of any circumstances where something benefits the state and the landowner retains control of the land that doesn't involve Fish, Wildlife, and Parks issues. He said there is a danger in opening up the language.

Sen. Bartlett said this type of language can create unintended consequences, and recommended that staff allow other knowledgeable people to critique it.

Rep. Brainard said that, without objection, the Committee would like the language of LC 0005 clarified and made more comprehensible and, if possible, more specific.

### Procurement Outreach

- Option a: A program designed similarly to the Oregon outreach program
- Option b: The same as option a, but regional in scope
- Option c: An annual program
- Option d: A traveling outreach program

Sen. Roush said that most small business owners would not attend a regional conference or fair. Mr. Eicholtz said he agreed, and added that Option b was intended for staff training.

Sen. Hargrove asked if the implementation of an outreach program would require an appropriation of funds. Mr. Bohyer replied, "yes," and said that any appropriation could be included in HB 002 or in a stand-alone bill.

Rep. Brainard said a stand-alone bill should outline the strategy. He said he thought Option c was the most appropriate approach because a central location would allow for more of a one-stop shopping approach. He said that businesses will make the effort if they know where to get the information and are interested.

Rep. Clark said that a convention of Made-in-Montana businesses is currently in Great Falls and suggested those types of gatherings would provide an opportunity to disseminate information. Mr. Eicholtz said that the DOA is occasionally invited to attend trade fairs and conventions. He said the down side is that the state may spend a lot of money to reach people who provide products that the state will never buy.

Sen. Roush said that an outreach program does no good if the people cannot do business with the state, referring to earlier discussion about perceived barriers to bidding on state contracts.

Rep. Brainard said the first step is to determine how many vendors want to do business with the state, and then determine if there are barriers to bidding for that business.

Sen. Roush asked if outreach would be conducted by all departments, or only the DOA. Rep. Brainard said Option c implies only the DOA.

Sen. Hargrove said there is a danger of micromanagement from setting up programs through legislation and tying the hands of the department.

Rep. Brainard said one of the problems with that approach is that the Legislature must establish some guidelines that state what it wants to accomplish. He said that it is a statement of policy, with attached costs.

Sen. Hargrove said that he would not wish to see the details codified.

Rep. Brainard said he thought the DOA would have requested the appropriation long ago if it was believed that it could be accomplished without specific legislation.

Mr. Eicholtz said that his preference would be for Option a.

Rep. Dell recommended that all Committee members receive a copy of the handbook published by the DOA. Mr. Eicholtz said that he would make sure that is done, and added that the handbook also appears on-line.

Rep. Brainard asked for Committee preference on the option to be pursued and the Committee unanimously chose Option a.

Automatic Notification to Vendors, On-Line Bidding, and On-Line Contract Accounting

The same software package can provide on-line notification to vendors, submission of bids and possibly bid awards, and payment.

Rep. Dell suggested an alternative option that would consist of posting the contract itself on-line and providing Internet addresses. Mr. Eicholtz said any contract of \$15,000 or more is now posted on the Internet.

Rep. Brainard said, without objection, option a (software implementation) would be pursued.

#### Education and Training of Contract Officers and Assistants

- Option a:     Require national certification
- Option b:     Development of a state certification program
- Option c:     A combination of options a and b
- Option d:     Develop and implement an ongoing education and training program in conjunction with option a, b, or c

Rep. Brainard asked for an estimate of the number of people who would require certification. Mr. Smilie said that was nearly impossible to determine because some agencies are administering contracts that are not covered by procurement law.

Rep. Dell asked if continuing education is a component of national certification. Mr. Eicholtz said that was correct, but often internal training may count toward obtaining or maintaining national certification.

Rep. Dell asked if national certification could be attained through utilizing a state training program, and would it be necessary to create a separate program. Mr. Eicholtz said the national certification provides a good foundation in procurement training, but there must be separate training for how Montana operates.

Rep. Brainard asked what the scope would be for option b. Mr. Bohyer said that question is not easily answered because most people who are managing contracts do not have the title of Contract Manager and have had the duties imposed on them in addition to their regular duties.

Rep. Brainard said the basic question is whether there will be national or state certification, or both.

Sen. Hargrove asked if certification is pursued, will personnel have to be designated with the title of Contract Manager. Mr. Bohyer said that a specific job title is a possibility. He also said that the Legislative Audit Division has identified lack of contract management as a primary problem. He said the largest problem may be that there are not enough people in state government to manage contracts.

Sen. Hargrove said that because contract management is very important to the federal government, national certification may be all that is needed.

Rep. Brainard said requiring national certification alone is a hit-or-miss proposition because there is the question of whether state personnel will pursue it, when they will pursue certification, if it must be in addition to regular duties, and how many actually need the certification.

Mr. Eicholtz said the intention was that the proposed FTE would design and implement the program, training 15 people the first year, and 15 people every subsequent year.

Rep. Brainard asked if the state program was intended to be a 1- or 2-day training session. Mr. Eicholtz said that was correct.

Mr. Bohyer said that national certification can probably be obtained on-line, and said that the Professional Development Center (within the DOA) has personnel whose duties include education.

Rep. Brainard said that requiring only national certification is the same as saying the state cares about training, but does not care enough to carry out adequate training.

Diane Tordale, DOT, said that if certification is tied to delegation authority, many more people than the 15 mentioned will need to be trained the first year. Mr. Eicholtz said certification will not be tied to delegation authority.

Rep. Brainard said that he is not interested in creating another tier of state employee and is more interested in getting the people who are doing the work now trained to make them more effective. He said option c should be pursued, for contract officers and managers.

#### Contract Enforcement/Attorneys

Option a: Hire four contract specialty attorneys

Option b: Continuing education and training for contract enforcement staff, in conjunction with option a

Rep. Brainard said that in the Oregon model, contract review was delegated to the Department of Justice legal staff. He said that, in Montana, it would be most effective to place contract enforcement duties with the Attorney General's staff.

Sen. Hargrove asked what the Attorney General (AG) might think of that idea. Mr. Smilie said there are good reasons for placing contract specialists with the AG or in the DOA. He said that having attorneys with litigation experience is very important,

too. He said one problem is inducing people to draw on the resources that are already available.

Sen. Hargrove asked if the private sector can be relied on for litigators. Mr. Smilie said that a good litigator is special, and is a very expensive resource, too.

Rep. Brainard said that keeping an adequately trained cadre would be the AGs challenge if the contract attorneys are located in that office.

Ms. Tordale said the attorneys have to be accessible and have to be knowledgeable about each department's way of doing business. Without easy access on the front end, procurement staff may be reluctant to pursue advice or counsel, thus resulting in other problems later.

Rep. Brainard said he was considering litigators, not contract designers, being located in the AGs office. He said that contracting will continue whether the Committee acts or not. He was not certain that option a would be the most effective use of the money.

Mr. Bohyer said having a contract specialty staff up front might prevent litigation later on.

Mr. MacMaster said the contract specialists should be used in contract development, too, not just litigation.

Sen. Hargrove asked if data could be presented that would quantify how much money would be saved by pursuing this option. Mr. Bohyer said that information could be sought from the DOA and Department of Justice (DOJ).



Mr. Smilie asked Ms. Tordale if she would prefer to have an in-house attorney or consulting a DOJ attorney at \$70 an hour. Ms. Tordale said she would prefer to rely on in-house legal counsel because much time would be spent familiarizing the DOJ attorney with the details of the contract and the case.

Mr. Bohyer suggested that staff develop some assumptions for the next meeting.

Rep. Brainard said another issue that has not yet even been considered is contract review.

#### Department of Administration Staffing vs. non-Department of Administration Staffing

The options include adding staff to the DOA or contracting out those services.

Rep. Brainard said, without objection, option a (adding staff to the DOA) would be pursued because contracting out the work is not a viable option.

#### Contract Management Staffing

The option requires the addition of staff.

Rep. Clark asked how many managers would be needed to adequately manage contracts. Mr. Bohyer said that is an unanswerable question right now.

Sen. Roush asked if there had been adequate staff during the past several years, could the cost from mismanaged contracts have been recovered. Mr. Smilie said that it's difficult to determine whether large contracts are being adequately monitored. Mr. Bohyer added that in the mental health managed care, some Department of Corrections contracts, and others, there apparently was not enough monitoring taking place.

Rep. Brainard said the issue really involves the scale of what is required.

Mr. Bohyer said the Committee may wish to examine the issue of contract staffing in non-DOA agencies during the next biennium because of the difficulty involved in gathering pertinent data. He said the LAD can be requested to do the auditing, or an outside consultant could be hired.

Rep. Brainard said a lot of criticism of the state's delivery of service does not always translate into Executive Branch action. He said that waste in large contracts maybe the result of lack of management, but how much money would be saved or how more effective services might be delivered cannot be quantified.

Rep. Brainard said the Committee would proceed with examination of option a.

#### **ADJOURNMENT**

Sen. Hargrove moved to adjourn. The meeting was adjourned at 5:30 p.m. The next meeting is scheduled for May 18-19, 2000.

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